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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-951

UNITED STATES OF AMERICA,
Respondent,
v.
DAVID BOHN,
Petitioner.

UNITED STATES OF AMERICA,
Respondent,
v.
VERNON J. KLEVE, GEORGE M. PATTERSON and MAX WEISBERG,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INTRODUCTORY PARAGRAPH

Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, entered in this case on January 3, 1975, affirming the judgment of conviction of the United States District Court for the District of Minnesota entitled United States of America v. Vernon J. Kleve, et al., entered March 2, 1973.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals has not yet been printed. A copy of said opinion is set forth in the appendix to this petition. There was no formal opinion of the District Court for the District of Minnesota.

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was entered on January 3, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court's opinion in *United States v. Chavez*, — U.S. —, 94 S. Ct. 1849 (1974), forecloses an evidentiary hearing to determine whether a wiretap application was in fact authorized by the Attorney General, where an offer of proof has been made that the affidavit of former Attorney General Mitchell, relied on by the government to establish that such authorization was given, is false.

2. Whether due process of law and congressional intent is violated by holding that several individual bookmakers, who do not know one another, who do not share telephones, customers profits or losses, or maintain any specific accounting among one another, fuse themselves into a single illegal gambling business involving five or more persons as proscribed by 18 U.S.C. Section 1955 by merely exchanging line information or making layoff bets with a common source?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title 18 U.S.C. Section 1955 provides:

"(a) Whoever conducts, finances, manages, supervises, directs or owns, all or part of an illegal gambling business . . .

"(b) As used in this section—

"(1) illegal gambling business means a gambling business which—

* * * * * * *

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business."

2. Title 18 U.S.C. Section 2516 provides:

"(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application . . ."

3. Title 18 U.S.C. Section 2518 (10)(a) provides:

"(a) Any agreed person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of the authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

4. The Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

5. The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

STATEMENT OF THE CASE

An indictment was filed on June 25, 1971, charging the petitioners and nine others[1] with violations of 18 U.S.C. Section 1955, engaging in a gambling business (Count II) and of 18 U.S.C. Section 371, conspiracy to engage in such a gambling business. Numerous pre-trial motions were filed on behalf of all defendants, including a motion to suppress the wiretaps which was granted, but reversed in *United States v. Kleve*, 465 F. 2d 187 (8th Cir. 1972). Among others, a variety of motions to dismiss the indictment were made and denied. The motion to suppress the wiretap was made on the grounds that the application was not authorized by the assistant attorney general specially designated to do so, but rather by a deputy assistant attorney general. The government relied on the affidavit of former Attorney General Mitchell that he had authorized the application. Petitioners objected to the use of the affidavit and requested an evidentiary hearing to determine whether Mr. Mitchell did actually authorize the application or whether he merely

[1] Joseph Sierbinski, Dick Randy Randazza, Vernon J. Kleve, Max Weisberg, George Patterson, Peter Cohen and Evelyn Darlene Kleve, and Neil Naftalin. Peter Cohen died before trial. Neil Naftalin's case was dismissed.

designated his assistant to do so. Although an offer of proof was made that the affidavit was false on its face, the District Court denied the requested hearing. When the matter came on for trial on October 24, 1972, all defendants waived jury trial and agreed to trial by the Court. (T.T. 6 et seq.)[2]

The government's theory was that petitioners Kleve, Patterson and Weisberg operated the gambling enterprise, while petitioner Bohn's connection was based solely on having made two bets to the enterprise, characterized by the government as "lay-off" bets. The testimony at trial consisted primarily of description and interpretation of the wiretapped conversations, the transcript of which was received in evidence. The taps were attached to four telephone lines listed to V. Kleve and Patterson, doing business as A. & W. Supplies. (T.T. 25) Conversations on the lines were monitored from April 29 to May 12, 1971. (T.T. 26, 35, 83). During this period, when many hundreds of calls were recorded, only three calls allegedly involving Mr. Bohn were included. The three conversations attributed to Mr. Bohn took place on May 11 and 12, the last two days of the wiretap. (T.T. 84). No earlier or other involvement or connection with the Kleve-Patterson-Weisberg operation was shown.

The government called as an expert in gambling matters FBI agent Theodore C. Whitcomb. Whitcomb admitted that there was no evidence that Mr. Bohn ever relayed "line" information to the bookmakers (T.W. 201), and that nowhere in the evidence did it definitely appear that Mr. Bohn "laid off" any bets (T.W. 202), nor was there evidence that Mr. Bohn ever accepted a bet. (T.W. 221). Finally he stated that one of the Bohn phone calls was "indicative" of a call between bookmakers

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[2] The transcript of trial is in two volumes with duplicate pagination. Testimony of witness Whitcomb is separately bound and numbered pages 122-227, and to avoid confusion will be referred to as Transcript of Whitcomb, or T.W., as opposed to T.T. for Transcript of all other witnesses, which is numbered 1-242.

(T.W. 225-226). No connection was shown between Bohn and the co-defendants other than Kleve and Patterson.

None of the defendants introduced testimony. Final arguments were submitted in written memoranda.

Judge Larson on January 9, 1973, issued his order finding all defendants guilty, without commenting on the specifics of the evidence. Motions for a new trial, for acquittal and for arrest of judgment, raising numerous issues including those argued on appeal, were denied by Judge Larson's order of March 2, 1973. Mr. Bohn's motion for a new trial was supported by his affidavit stating that he had been in Florida during the period of the alleged conspiracy up to May 10, 1972, when he returned to Minneapolis. He admitted placing personal bets with the Kleve-Patterson-Weisberg "book" after his return, but denied being involved in any way in the operation of that or any other bookmaking operation, and denied making any "layoff" bets. He said on the advice of counsel he reluctantly decided not to testify at trial. Defendants George Patterson and Max Weisberg both submitted affidavits in support of Mr. Bohn's motion. They admitted operating a bookmaking business, but asserted that Mr. Bohn was merely a betting customer not in any way involved in the operation, that his bets were not layoff bets, and that they would testify to this and would have so testified at trial but for the problem of self-incrimination it posed for them in the joint trial. The motion requested leave to present additional testimony pursuant to Rule 33, Federal Rules of Criminal Procedure. This motion, too, was denied in the order of March 2, 1973.

On March 13, 1973, Mr. Bohn was sentenced to one year imprisonment on each count, the sentences to run concurrently. Mr. Kleve and Mr. Patterson each were sentenced to 18 months, and Mr. Weisberg received a six month sentence. The Eighth Circuit Court of Appeals affirmed all convictions. See opinion at Appendix A. All were continued on bail pending appeal.

REASONS FOR GRANTING THE WRIT

I

This Court's Decision in *U. S. v. Chavez, Supra,* Does Not Preclude an Evidentiary Hearing Where Challenge Has Been Made to the Truth of an Affidavit Relied Upon by the Government to Prove That a Wiretap Application Was Authorized by the Attorney General.

The denial of an evidentiary hearing would reduce to a nullity the protections built into the wiretap authorization procedure. In addition, there is a conflict in the circuit courts as to whether an accused is entitled to an evidentiary hearing where the wiretap authorization procedure is challenged by a motion to suppress.

The wiretap authorization procedure involved here is the same as in *Chavez*. However, unlike *Chavez* the petitioners specifically objected to the government's use of Mr. Mitchell's affidavit to establish that he had in fact authorized the application rather than designating an assistant to do so, and requested an evidentiary hearing to challenge its truthfulness. An offer of proof was made that an evidentiary hearing would establish that Mr. Mitchell did not authorize the application for the wiretap. It was pointed out that the "authorization" by Mr. Mitchell was alleged to have occurred on the same day as his memorandum to Assistant Will Wilson, the receipt of the memorandum by Assistant Henry Peterson and his letter to Assistant District Attorney Earl Cudd in Minneapolis, and finally, the presentation to Judge Devitt and his resulting order. Indeed Mr. Mitchell's memorandum designating Wilson to assume the authorization powers of the attorney general itself contradicts the self serving allegation in the affidavit that Mr. Mitchell authorized the application.

No challenge was made to the Mitchell affidavit in *Chavez*, where this Court expressly set forth the requirement that the government "clearly establish" that the attorney general authorized the application. However, because no challenge to the affidavit was made, this Court assumed that the attorney general had in fact authorized the application and went on to decide the identity issue.

Petitioners submit that the recent conviction of Mr. Mitchell on two charges of perjury before a federal grand jury support their claim that an evidentiary hearing should have been ordered upon the challenge to Mr. Mitchell's affidavit. One of the acts of perjury for which Mr. Mitchell was convicted occurred only three weeks before he executed the "cure all" affidavit in the instant case. Mr. Mitchell's subsequent conviction is frightening proof that an accused must have an opportunity to challenge an affidavit that goes to the very question of whether the wiretap was authorized at all.

While the Eighth Circuit has denied the right to an evidentiary hearing, the opposite result has been reached by the Fifth Circuit Court of Appeals. In *United States v. Robinson*, 468 F. 2d 189 (5th Cir. 1973), and *United States v. Bowdach*, 474 F. 2d 812 (5th Cir. 1973), the Fifth Circuit Court of Appeals remanded for evidentiary hearing to determine whether Mr. Mitchell himself authorized the applications or whether he designated an assistant to do so, even though the affidavits indicated Mr. Mitchell's personal involvement. It is noteworthy that at the conclusion of the hearing held on remand the District Court suppressed the evidence obtained in the wiretap.

Nor is there unanimity within the Eighth Circuit Court of Appeals itself. Judge Bright, concurring in *United States v. Brick*, 502 F. 2d 219 (8th Cir. 1974), stated that he would remand for an evidentiary hearing to determine the procedure followed in the authorization process, but felt that *Chavez* pre-

cluded such a hearing. Again, in *United States v. Thomas, et al.*, —F. 2d—(filed Jan. 3, 1975), a companion to the instant case, Judge Heaney dissented, stating that *Chavez* did not foreclose a remand for an evidentiary hearing to examine the truth of Mr. Mitchell's affidavit.

Section 2518 (10)(a) of the wiretap statute specifically provides for proceedings to suppress the contents of an intercepted communication. Although the burden of going forward is on the moving party, that burden was satisfied by proof that the signature of Will Wilson was forged and the application and order identified the wrong person authorizing the application. The burden of proof, having then shifted to the government, was not satisfied by affidavits of Mr. Mitchell and others on such crucial issues of fact. Affidavits are not a substitute for competent proof when factual issues are properly raised. *Cohen v. United States*, 378 F. 2d 751 (9th Cir. 1967).

The issue here is not the right to an evidentiary hearing to probe beneath the surface of affidavits offered to support a search warrant or even an application to wiretap. Rather, the affidavit here goes specifically to the issue of whether the government could have conducted the wiretap at all. *Chavez* does not preclude an evidentiary hearing when such an affidavit has been challenged. To so interpret that case would eliminate the requirement that the attorney general or one designated by him authorize the application, without which provision the wiretap statute would not be constitutional.

II

Due Process of Law and Congressional Intent Is Violated by Holding That Several Individual Bookmakers, Who Do Not Know One Another, Who Do Not Share Telephones, Customers, Profits or Losses, or Maintain Any Specific Accounting Among One Another, Fuse Themselves Into a Single Illegal Gambling Business Involving Five or More Persons as Proscribed by 18 U.S.C. Section 1955 by Merely Exchanging Line Information or Making Layoff Bets With a Common Source.

The holding of the Eighth Circuit Court of Appeals in this case has, contrary to congressional intent, broadened the federal government's criminal enforcement power so as to rival the power of the states to regulate localized gambling operations. The decision also stretches the plain meaning of the ordinary words in 18 U.S.C. Section 1955 to encompass activity that persons of common intelligence never would have ascribed to it, thus violating fundamental principles of due process of law. Two Judges of the Eighth Circuit have dissented in separate cases[3] from the majority's interpretation of the statute. This Court should grant the writ so that federal jurisdiction will not go beyond what was intended by Congress, and so that fundamental principles of due process of law will be vindicated.

Congressional Intent

It is appropriate to examine the vision of the Congress in enacting Section 1955, for this statute had a very specific and important purpose: to punish the massive syndicated gambling

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[3] While Judge Heaney authored the opinion below, he adhered to his dissent in *United States v. Thomas, et al.*, Nos. 73-1490, 73-1544 (8th Cir. Jan. 3, 1975) which adopted Judge Lay's dissent in *United States v. Schaefer*, No. 73-1506 (8th Cir. Jan. 3, 1975), reprinted in Appendix B.

operations of organized crime—to wit, the Mafia, Cosa Nostra, and similar underworld institutions.

The intent in enacting Section 1955, as spelled out by the Congress, was

> not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business type gambling operations of *considerably greater magnitude than simply meet the minimum definitions*. . . . It is intended to reach only those persons who *prey systematically upon our citizens* and whose syndicated operations are *so continuous and so substantial as to be of national concern*, and those corrupt state and local officials who make it possible for them to function. 2 U.S. Cong. & Adm. News, 1970 at 4029. (Emphasis supplied.)

In dismissing a gambling business indictment because of an unlawful wiretap, Judge Kaess reviewed the expressed legislative purpose of The Organized Crime Control Act of 1970 as follows:

> The Court notes in passing that, when Congress enacted "The Organized Crime Control Act of 1970," it was concerned with organized, large-scale illegal activities. Congress found that "(1) organized crime is a highly sophisticated diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and

other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970).

He then added *obiter*, apropos the case before him:

A review of the indictment in this case indicates to the Court that this case does not appear to be the large octopus-like operation contemplated by Congress when it enacted the organized Crime Control Act of 1970. All of the activities alleged in the indictment appeared to be purely local in nature.

The federal Government should be reluctant to encroach on areas which have traditionally been left to the States. Younger v. Harris, 401 U.S. 37, 8 CrL 3103. In these areas which effect the federal-state relationship, the utmost care should be exercised. Many times in the past federal criminal prosecutions have been struck down when proof of a nexus with interstate commerce has not been established. U.S. v. Bass, 40 L.W. 4101 (December 20, 1971). It seems

> to the Court that the present case runs dangerously close to the border line between the State and Federal governments. The Government should be very careful not to misuse the power given to it by the organized Crime Control Act of 1970. If it were to prosecute every illegal gambling operation which was brought to its attention, it would severely tax the federal police resources. *United States v. Wierzbicki* (E.D. Mich., Sept. 15, 1972), reported to date only in 12 Criminal Law reporter 1075, 1076.

Congress specifically and deliberately excluded mere bettors, or customers of bookmakers, from this legislation's proscription:

> As originally drafted Title VIII of Senate Bill 30 which became the Organized Crime Control Act of 1970 defined an illegal gambling business as one which "involves five or more persons who *participate* in the gambling activity." (emphasis added) This language was criticized because it might include mere bettors. [citations omitted] The House Amendment, which became law, substituted "conduct, finance, manage, supervise, direct, or own" for "participate." The House Judiciary Committee Report explains:
>
> > "The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet." House Report at 53,
>
> 2 U.S. Code Cong. & Admin. News 1970 at p. 4029. *United States v. Riehl*, 460 F.2d 454, 459 (3rd Cir. 1972) (emphasis supplied).

Thus, the five or more persons whose functions are explicitly referred to must be actually involved in the gambling business either as directors or owners (as those terms are commonly understood) or as employees or agents of the directors and owners—"runners," card dealers, cooks, watchmen, doormen, book-

keepers, bet-takers, relayers of line information, corrupt officials "protecting" the business, and so on. While it may strain the common meaning of the term "conduct" to include the more lowly of these employees, the legislative history seems to contemplate their inclusion. This is perfectly logical, since such employees are obviously essential, more or less, to the conduct of the business, and their interests are entirely consistent with those of their superiors and the business itself. Conversely, it is universally agreed, also in view of the legislative history, that mere customers cannot be included. But between the directors and employees of the business, and the "mere" bettor, the government theorizes, falls the layoff bettor, or the bookmaker-customer of the gambling business who bets to offset his own losses.

It is important to note that Congress is not without knowledge of "layoff" betting. The 82nd Congress in 1951 enacted 26 U.S.C. Section 6419(b)[4] regarding excise taxes on wagering, which provided for tax credits on layoff wagers. The legislative history of that statute discussed the meaning, terminology and purpose of layoff betting. See House Report, 2 U.S. Code Cong. & Admin. News 1951 at pp. 1841-1842. The history of this moribund law is especially pertinent here for two interrelated reasons: it shows unequivocally that Congress was well-informed upon the subject of layoff betting and yet made no reference to it in Section 1955, and, most importantly, Congress' expressed understanding of this process clearly distinguishes the bookmaker as such, who accepts wagers and is taxed for them, and the bookmaker as a layoff bettor, who is entitled to a tax credit. In view of this it surely cannot be said that when they enacted Section 1955 Congress intended sub silentio to combine the two distinct entities which they so carefully separated in the earlier statute.

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[4] This section, which depends upon Chapter 35 (26 U.S.C. §§ 4401 et seq.), is probably moot since the wagering tax provisions were generally held unconstitutional; *United States v. Grosso*, 390 U.S. 62 (1968).

The decisive significance of the omission of layoff betting from the present Section 1955 is underscored, as well, by this: The President's Version of the Revised Federal Criminal Code has redrafted the statute to include layoffs quite explicitly:

> Sec. 1831. Engaging in a Gambling Business.
>
> (a) Offense. A person is guilty of an offense if he:
>
> (1) owns. controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business; or
>
> (2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling.
> 13 Cr. L. at 3015

If the President thought it necessary to add receiving of layoff wagers to the statute, the implication is clear that this is not included now in the statute; a fortiori the placing of layoff wagers is not included in a Section 1955, for (*exclusio unius est exclusio alterius*) placing layoff wagers is not even included in the expanded version. For a more detailed and articulate discussion of the legislative history of Section 1955 see Judge Lay's dissent in *United States v. Schaefer*, No.73-1506 (8th Cir. Jan. 3, 1975), in Appendix B hereto.

Due Process and Statutory Construction

Section 1955 is penal legislation, creating a crime *malum prohibitum* of rather more than usual specificity. Yet the description of the prohibited involvement—conduct, finance, manage, supervise, direct or own—is woefully ambiguous in some circumstances, circumstances such as this prosecution. The ambiguity is not really of the Congress' making; it results rather from the evidence which by tortured semantics the government here seeks to manipulate into the shape of one of those operative

words—conduct, finance, etc.—and from the interpretation given by the various courts of appeal.

In another Section 1955 case Judge Bright referred to the term "business" in the statute as "nebulous and elastic in scope." *United States v. Schullo*, Nos. 73-1490, 73-1544 (8th Cir. Jan. 3, 1975). Yet, he proceeded to "find" a narrower definition by examining the same legislative history which led two of his colleagues to a different conclusion. See Judge Heaney's dissent in *Schullo*, adopting Judge Lay's dissent in *United States v. Schaefer*, supra.

Living under a rule of law requires that "all [persons] are entitled to be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *Lanzetta* is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct. See *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). This statute as interpreted by the government violates the due process requirement of specificity and thus is void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *United States v. Hariss*, 347 U.S. 612, 617 (1954).

It is a desideratum of criminal jurisprudence that:

> A criminal statute must be strictly construed. . . . Ambiguity in criminal statutes should not be resolved so far as to embrace offenses not clearly within the law. The facts charged and proved must bring the defendant *plainly and unmistakably* within the statute. *Schooler v. United States*, 231 F. 2d 560, 564 (8th Cir. 1956) (emphasis supplied).[5]

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[5] Quoting *Farmer v. United States*, 128 F.2d 970, 972 (10th Cir. 1942) (emphasis supplied.) See also *Gesell v. United States*, 1 F. 2d 283 (8th Cir. 1924).

Justice Butler phrased it thus in *United States v. Resnick*, 299 U.S. 207 (1936):

> Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses.

More recently this Court held in *Rewis v. United States*, 401 U.S. 808, 812 (1971), that the Travel Act (18 U.S.C. Section 1952) could not be read to punish an activity under the commerce clause merely because it was occasionally patronized by customers from another state, reiterating that "ambiguity concerning the *ambit* of criminal statutes should be resolved in favor of lenity."

And, in *Toussie v. United States*, 397 U.S. 112, 122 (1970), the Court said, quoting *United States v. Universal Corp.*, 344 U.S. 218, 221-222 (1952):

> when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

It is unnecessary to multiply the citations of this axiom, but the principle is important here, even decisive, and it must be borne in mind, together with the expressed legislative intent, in passing upon this record.[6]

If the terms of gambling statute are admittedly "nebulous and elastic in scope," it is difficult to conceive how men of ordinary

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[6] See also *Bell v. United States*, 349 U.S. 81 (1955); *F.C.C. v. National Broadcasting Co.*, 347 U.S. 284 (1953); *Smith v. United States*, 360 U.S. 1 (1959); *France v. United States*, 164 U.S. 676 (1897); *United States v. Halseth*, 342 U.S. 277 (1951); *Martyn v. United States*, 176 F. 2d 609 (8th Cir. 1949); *Jacobs v. United States*, 359 F. 2d 960 (8th Cir. 1966).

intelligence could use them as guideposts for accepted behavior Nothing in the language of Section 1955, the legislative history, nor the decisions can justify classifying these persons as conductors of the principal business (and thus felons under Section 1955) rather than mere bettors (and thus exempt). To do so blatantly violates due process by fashioning crime from language ambiguous at best in its application; it violates logic, as embodied in the rules *noscitur a sociis* and *ejusdem generis*. For the layoff bettor's interests conflict with those of the other bookmaker, just as any bettor's do.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners pray that a Writ of Certiorari be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 73-1271

United States of America,
Appellee,

v.

David Bohn,
Appellant.

Appeal from the United States District Court for the District of Minnesota.

No. 73-1299

United States of America,
Appellee,

v.

Vernon J. Kleve, George M. Patterson and Max Weisberg,
Appellants.

Appeal from the United States District Court for the District of Minnesota.

No. 73-1182
No. 73-1183

United States of America,
Appellee,

v.

Dick Randazza and Joseph Sierbinski,
Appellants.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 12, 1973

Filed: January 3, 1975

Before Heaney, Stephenson and Webster, Circuit Judges.

Heaney, Circuit Judge.

Vernon Kleve, George Patterson, Max Weisberg, Joseph Sierbinski, Dick Randazza and David Bohn[1] were convicted by the court of *conspiring* and of *engaging* with five or more persons in conducting, financing, managing, supervising and directing an illegal[2] gambling business from February 18, 1971 to June 18, 1971, in violation of 18 U.S.C. §§ 1955 and 371.

Kleve and Patterson were sentenced to eighteen months on each count; Bohn was sentenced to one year on each count; and Weisberg, Sierbinski and Randazza were sentenced to six months on each count. The judge ordered that the sentences of each defendant be served concurrently.

Numerous common issues are raised by the defendants. Many of these issues have been answered adversely to the defendants in recent opinions of this Court. We have held in cases factually similar to this one that the government's failure to correctly identify the officer who in fact authorized application for wiretap orders pursuant to 18 U.S.C. § 2518(1)(a) does not require suppression of evidence obtained through

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[1] Neil Thomas Naftalin, Peter Cohen, John Ruberto, Vivian (Peg) E. Ruberto and Evelyn D. Kleve were also charged in the same indictment. The government dismissed the charges against Neil Thomas Naftalin and Peter Cohen. The others were found guilty of both counts of the indictment and have not appealed.

[2] The activities were illegal under Minnesota law, M.S.A. § 609.76.

wiretapping, *United States of America v. Nick John, et al.*, Nos. 72-1565, 72-1566, 72-1581 and 72-1594 (8th Cir. December . . , 1974); *United States of America v. Eugene Schaefer, et al.*, Nos. 73-1506, 73-1526, 73-1538, 73-1577, 73-1578, 73-1611 and 73-1617 (8th Cir. January 3, 1975); *United States of America v. Steve Thomas, et al.*, Nos. 73-1490 and 73-1544 (8th Cir. January 3, 1975); *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), that it is not necessary to remand cases to the District Court to test whether Attorney General Mitchell in fact authorized the application for the wiretap order,[3] *United States of America v. Nick John, et al., supra; United States v. Brick, supra*, and that absent a clear showing of prejudice, a failure to comply with the notice and inventory requirements of 18 U.S.C. § 2518(8)(d) does not require suppression of wiretap evidence, *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972). We follow those decisions here, and hold that similar contentions raised by the appellants here are without merit.

It is not necessary for us to consider whether it was proper to convict each defendant of conspiracy as well as the substantive offense, because all defendants were given concurrent sentences on each count and no showing has been made that adverse consequences will flow from the application of the concurrent sentences.[4]

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[3] The author adheres to his dissent in *United States of America v. Steve Thomas, et al.*, Nos. 73-1490 and 73-1544 (8th Cir. January 3, 1975), but accepts the decision of the Court as binding on this panel.

[4] This case is, therefore, unlike *United States of America v. Eugene Schaefer, et al.*, Nos. 73-1506, 73-1526, 73-1538, 73-1577, 73-1578, 73-1611 and 73-1617 (8th Cir. January 3, 1975), where *consecutive* sentences were given to a number of defendants. There, we reversed the conspiracy convictions on the ground that the conspiracy consisted of nothing more than an agreement which the defendants performed by the commission of the substantive offense and that, therefore, the charge was violative of the Fifth Amendment command against double jeopardy.

Appellants Kleve, Patterson and Weisberg challenge the constitutionality of 18 U.S.C. § 1955. They contend that the term "conduct," which identifies those persons to be included within the "five or more" requirement of the statute is ambiguous and violative of due process on the ground of vagueness. The Third and Ninth Circuits have upheld the constitutionality of 18 U.S.C. § 1955 against this challenge. We agree with the results there reached. *See United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974); *United States v. Riehl*, 460 F.2d 454 (3rd Cir. 1972).

There is no merit to the contention of Randazza and Sierbinski that the trial court's special findings of fact were inadequate under Federal Rule of Criminal Procedure 23(c). While the special findings made at their request are sketchy, they are sufficiently complete to satisfy the minimum requirements of the rule. We can discern therefrom the legal and factual basis of the trial court's verdict. Moreover, we are convinced, notwithstanding their conclusary allegations to the contrary, that the appellants' ability to appeal all assignments of error was not impaired. *See United States v. Livingston*, 459 F.2d 797, 798 (3rd Cir. 1972) (en banc).

There is little merit to the contentions of Kleve, Patterson and Weisberg that the affidavits in support of a warrant to search Apartment 103, University Apartments, 1414 Third Street, South, Minneapolis, Minnesota, and in support of a warrant for their arrest, failed to state facts sufficient to establish a probable violation of § 1955. The affidavits in support of the search and arrest warrants were signed on June 21, 1971, by George Anderson, a Special Agent of the Federal Bureau of Investigation. The affidavits were presented to the same magistrate. When read together, the affidavits clearly show probable cause for believing that Kleve, Patterson and Weisberg operated a "book," and that Evelyn Kleve worked with them in the operation of the book. The affidavits also

set forth probable cause for believing that the "Kleve book" received and exchanged "line information" and accepted wagers and layoff bets from other bookmakers, including Randazza and Bohn. Anderson recited that he had obtained this information from personal observation, from court-approved telephonic interceptions, *see United States v. Kleve*, 465 F.2d 187 (8th Cir. 1972), and from informants who had furnished reliable information to him in the past on gambling matters and who had personally used the telephone to place bets with the Kleve book in the period immediately preceding the request for the warrants. The affidavits thus gave probable cause to believe that five or more persons were conducting a gambling operation in violation of § 1955 in Apartment 103. It follows that the search and arrest warrants were clearly valid as to those who directly conducted the Kleve book, *i.e.*, Kleve, Patterson and Weisberg.

There is more of a question with respect to Bohn. We believe that the affidavits, when read together, show probable cause for arresting him for violating § 1955. They can reasonably be read as stating that Bohn was a bookmaker, who received "line information" from the Kleve book and placed layoff bets with that book on May 12, 1971. For these reasons, Bohn would, under the theory adopted by the court below and hereinafter approved by this Court, be considered as one of five or more persons conducting and financing an illegal gambling business within the meaning of § 1955.

There is more than sufficient evidence to sustain the convictions of Kleve, Patterson and Weisberg on the substantive count. They were admitted bookmakers who engaged in every activity common to that occupation. Their claim on appeal is that their bookmaking business was not so extensive as to be prohibited by § 1955, since that statute covers only businesses involving five or more persons. Specifically, they challenge the government's theory that otherwise independent bookmak-

ers who "layoff" bets and exchange line information with their book can be counted in determining whether a gambling business involving five or more persons was being operated. They also claim that the government has failed to establish that the "Kleve book" in fact laid off bets with other bookmakers or exchanged line information with other bookmakers.

The challenge to the government's theory must fall. This Court, with Judge Lay dissenting, recently held that:

> The interdependence of the various individual components, including the sharing of line information and the exchanging of profits through layoff betting, outweighs the "independent businessmen" theory urged by appellants and satisfies us that there was one "illegal gambling business" here for the purposes of 18 U.S.C. § 1955. * * *

United States of America v. Eugene Schaefer, et al., supra at Slip Op. 10 (Footnote and citations omitted).

The claim of Kleve, Patterson and Weisberg that the book they operated did not deal with at least two other bookmakers must also fall because the evidence shows that they dealt with Bohn and Randazza, who also operated books.

There is more than sufficient evidence to sustain the conviction of Bohn on the substantive count. The wiretap transcripts reveal that Bohn received line information and placed layoff bets by telephone with the Kleve book on May 11 and 12, 1971. These conversations, according to the testimony of a government expert on cross-examination, were typical of those between bookmakers. When Bohn was arrested, two documents—a marked bottom sheet and a marked sports program of coming events—were found in his possession. Both documents, according to the same government expert witness, were records of the type commonly kept by bookmakers. Records found in the Kleve book supported this expert testimony.

There is also more than sufficient evidence to support the conviction of Randazza on the substantive count.

There is not sufficient evidence to sustain the conviction of Sierbinski on either the substantive or the conspiracy count. Giving the government the advantage of every permissible inference, it simply failed to make out its case. The only evidence with respect to Sierbinski is that he called the Kleve book on three occasions. During these calls, no line information was exchanged and no bets, layoff or otherwise, were made. All of the conversations concerned the payment by Sierbinski to the Kleve book of a sum of $168.00. While it can be inferred from the record that this money was owed because of one or two bets which Sierbinski had placed with the Kleve book, the conversations were not specifically categorized by the government's expert as being those of a bookmaker laying off his bets with another bookmaker. None of the terminology symbolic of layoff betting was used by Sierbinski or the Kleve book in any of the conversations. The govenment argues that the conversations indicate that at least $50.00 of the bet was placed with the Kleve book by Sierbinski for another party. They would have us hold that this single fact is sufficient to classify Sierbinski as a bookmaker and to sustain his conviction on the basis of this classification. We are unwilling to go that far.

The government further contends that in one of the conversations, the Kleve book and Sierbinski discussed two other individuals—an "Ollie" and an "Azar." We have read the conversations with respect to these men carefully and find nothing in them which would strengthen the government's contention. Assuming that "Ollie" and "Azar" were bookmakers, that fact does nothing to strengthen the government's contention that Sierbinski was a bookmaker who exchanged line information and made layoff bets with the Kleve book.

Appellant Bohn alleges error in the refusal of the trial judge to grant his motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion was based on the post-conviction affidavits of Weisberg and Patterson that stated their willingness to testify that, to the best of their knowledge, Bohn was a bettor and not a bookmaker. The granting or denial of a new trial motion is a matter within the broad discretion of the trial judge that rests upon factual and credibility determinations. *United States v. Stewart*, 445 F.2d 897, 899 (8th Cir. 1971). On the basis of the record before us, we cannot say that the trial judge abused his discretion here.

We affirm the District Court judgment of conviction as to Kleve, Patterson, Weisberg, Randazza and Bohn. We reverse its judgment with respect to Sierbinski.

A true copy.

Attest:

Clerk, U. S. Court of Appeals. Eighth Circuit.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

United States of America, Appellee, v. Eugene Schaefer, et al., Appellant.	Appeals from the United States District Court for the Eastern District of Missouri. Nos. 73-1506 73-1577 73-1578 73-1611 73-1617

Submitted: June 25, 1974

Filed: January 3, 1975

Before Lay, Bright and Stephenson, Circuit Judges

Lay. Circuit Judge, dissenting.

I would reverse the convictions on both counts. Congress did not intend by the enactment of § 1955 to expand federal criminal law so as to rival the power of the states to regulate localized gambling operations.[1] Yet this is the interpretation of

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[1] SENATOR McCLELLAN. I support the very laudable objectives of S. 2022, the illegal gambling business bill. Nevertheless, there are some reservations that I must express. I am concerned that the effect of this bill would be to extend Federal jurisdiction so far that it would be virtually the same as local criminal jurisdiction in this area. Now you have mentioned this problem in your remarks already.

MR. WILSON. We have tried to head that off, and if we haven't done it, it needs to be done, *because it is not our purpose to move all this into Federal courts.* (Emphasis added.)

Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 396 (1969).

§ 1955 which is now adopted by the majority opinion. It is inconceivable to me that Congress intended to commit the limited law enforcement resources of the federal government and the federal courts to the regulation of localized bookmaking. The Organized Crime Control Act of 1970, of which § 1955 is a part, was aimed at countering "organized crime" and its syndicated activities which are carried out on so large a scale as to affect interstate commerce and hence become a national concern. The several gambling provisions of the Act were intended to further its purpose by permitting federal prosecution of those gambling enterprises whose profits flowed to syndicated crime. *United States v. Sacco*, 491 F.2d 995, 998-99 (9th Cir., 1974) (en banc). The House Judiciary Committee Report states:

> The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve *business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions*. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function. (Emphasis added.)

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970); 2 U.S. Code Cong. & Admin. News 1970 at 4029.

The majority opinion holds that several individual bookmakers, who do not share phones, customers, profits or losses, or maintain any specific accounting or bookkeeping among one

another, can nevertheless fuse themselves into a single illegal gambling business involving five or more persons as proscribed by 18 U.S.C. § 1955. The magic synthesis by which all became one was allegedly accomplished by exchanging line information and, when it was to their individual profit, making layoff bets with the same person. The inevitable result of this decision is to subject all bookmakers to federal prosecution, a result which is contrary to the language and purpose of the Act.[2]

The legislative history of § 1955 makes it clear that Congress intended to limit the reach of § 1955 to entities so large and continuous that they might rationally be presumed, at least as a class, to finance organized crime and hence to fall within

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[2] It is uncontroverted that both the exchange of line information and layoff betting are necessary to "running a book," no matter how small. At trial the government's gambling expert, FBI Special Agent T. C. Whitcomb, testified:

> I think we've got to realize that we're speaking about a bookmaking business. Bookmaking by its very nature requires cooperation. Yes. You may have individual enterprises by various bookmakers in an area or a large area or a small area, but the loose affiliation I'm speaking about again requires cooperation between them in exchanging the line information, in taking of friendly bets, for paying for services, furnishing line information, for example, and also to have available certain of these bookmakers which will accept wagering in the terms that we're talking about, lay off, which protects the interests of the individual bookmakers and where one bookmaker lays off this time to another bookmaker, he will reciprocate at a later time and will take lay off from the other individual or may do it all on the same day. This is the nature of the bookmaking business. It can't be escaped.

Appendix at 401.

> Q. (By Mr. Cashill) Sir, in your opinion, what function does frequent or substantially continuous conversation among bookmakers for the purpose of exchanging lay off bets or wagers or to exchange line information serve insofar as their bookmaking operation is concerned?
>
> A. It keeps each of the individual bookmakers so involved in these conversations aware of changes, the very important changes, for example, in line or point information that comes

federal jurisdiction under the commerce power.[3] To that end, the statute requires proof of the existence of a single "illegal gambling business" involving five or more persons other than customers who "conduct, finance, manage, supervise, or own" the business for at least thirty consecutive days. 18 U.S.C. § 1955(b)(1). In light of this purpose, I cannot conclude that this language, which in common understanding and ordinary commercial usage would refer to a unified, organized business enterprise, was intended by Congress to encompass the isolated activities of these defendants.

The statutory language requiring proof that five or more persons conducted a *single* business commands evidence that each defendant acted *in furtherance of the alleged joint business.* At oral argument, the government conceded that mere exchange of line information did not evidence involvement in a single bookmaking business. However, the additional proof that defendants exchanged layoff bets with Lancaster with the object of in-

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> across in sporting events. It also permits them to know how the other bookmakers are being bet in case that, as bookmakers have to do from time to time, is adjust their line based on the original line that he had in order to probably attract activity or action or wagers on the other side of an event or more events. Generally, it is this mutual cooperation again that I speak about, the nature of bookmaking, independently organized, but must cooperate above the bettor level in order to continue to function adequately.

Appendix at 392-93.

If that necessary cooperation in itself proves that the participants are conducting the *same* illegal gambling business, then the requisite five persons can always be found and the statutory limitation is rendered meaningless.

[3] The justification for federal jurisdiction is premised on the rational connection between large-scale gambling and the flow of commerce. *United States v. Sacco,* 491 F.2d 995 (9th Cir. 1974). Thus, the constitutionality of the Act rests in large measure on its limited application to illegal operations of national concern. For the federal government now to expand the Act's prohibitions to local activities is to betray the congressional purpose.

dividual profit should be similarly insufficient under the Act.[4] More is needed to show that they were involved in the *same* business.

The majority reasons that Congress could not have intended to require further proof of complicity because bookmakers do not as a rule operate with centralized cashiers, bookkeeping and control, and that Congress was aware of that fact. Yet almost all § 1955 convictions affirmed by the circuit courts have rested on just such a further showing in bookmaking as well as other gambling businesses. Where employees are paid a salary or commission, where co-workers are subject to orders such as use of a uniform line, where several persons use the same office or phones to receive bets, where there is division of functions such as bookkeeping, taking bets and paying off winners, or where there is central handling of revenues, the language of the Act can rightly be invoked. *See United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974) (en banc) (division of functions among owners, phonemen and splitters); *United States v. Meese*, 479 F.2d 41, 42 (8th Cir. 1973) (partnership with 6-8 salaried employees and division of functions); *United States v. Hunter*, 478 F.2d 1019, 1022 (7th Cir. 1973) (partners employed 12

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[4] This is not to suggest that persons who place and accept layoff bets are immune from prosecution under § 1955 as mere customers. Congress intended layoff bettors in some instances to be within the reach of the statute. *Cf. United States v. DeCesaro*, 502 F.2d 604, 611 (7th Cir. 1974); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974). However, in my view something more than mere acceptance of those bets is needed to show that both are involved in the *same* business. That something extra could be demonstrated, as in *United States v. Ciamacco*, 362 F. Supp. 107 (W.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), by the existence of an *agreement* to rebate a percentage of the profits to layoff bettors. In addition, it might be sufficient if the government could show, over a period of several weeks, that the "layoff man" never refused to accept proffered bets or at least that he attempted to help the others place theirs if he did not want to accept them himself. That was not the case here, for these defendants refused to take layoffs, even from Lancaster, their supposed "boss," when it was not necessary to balance their *own* books on an individual basis.

others at same office); *United States v. Fino*, 478 F.2d 35, 36 (2d Cir. 1973) (several bet-writers phone bets in to central office with central bookkeeping); *United States v. Becker*, 461 F. 2d 230, 232 (2d Cir. 1972) (owners employed four runners); *accord, United States v. Harris*, 460 F.2d 1041, 1043 (5th Cir. 1972); *United States v. Vigi*, 363 F. Supp. 314, 321 (E.D. Mich. 1973); *United States v. Kohne*, 358 F. Supp. 1053, 1064 (W.D. Pa. 1973); *United States v. Mainello*, 345 F. Supp. 863, 883 (E.D.N.Y. 1972).

In *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973), the evidence showed considerably more interaction and evidence of agreement between the defendants than mere exchange of line and layoffs. The Fourth Circuit noted that the bookmakers had developed a system of placing split bets or "middling" utilizing the differences in the line in various states. Under the system the defendants might not always win, but they could not lose. *Id.* at 977. Furthermore, they always used a uniform line[5] to "prevent outsiders from playing them against each other, which was what they were frequently doing to other bookmakers." *Id.* at 990. Finally, some of the defendants relayed bets from the others to outside bookmakers as part of their system. *Id.* at 977.

Similarly, in *United States v. Ciamacco*, 362 F. Supp. 107 (W.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), the central figure, Levine, had an *agreement* with the individual bookmakers who laid bets off to him whereby he would rebate a percentage of his profits from handling their accounts. Clearly this demonstrates an essential interaction missing here.

The analogy drawn to describe the *Kotteakos* conspiracies is equally appropriate in this case. The appellants' separate

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[5] The evidence showed that defendants in this case did not always use the same line. Yet the government's own expert witness testified that within a single bookmaking business, a uniform line was essential.

bookmaking enterprises formed a pattern of " 'separate spokes meeting at a common center,' though . . . without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). Lancaster was the hub, the common denominator, of otherwise unrelated enterprises. Even his position was, as likely as not, fortuitous. Had another's phone been tapped, that person might have appeared as the hub, and quite a different group of defendants might have been indicted for the expert admitted that each of those who talked to Lancaster probably sought the opinions of and laid off bets to other bookmakers with equal frequency. That necessary cooperation and loose affiliation are the nature of the bookmaking business, but a higher degree of concerted activity was required by Congress in § 1955. Drawing again on *Kotteakos*, it is appropriate to remember that

> [t]hieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a "fence" to make them such.

Id. at 755.

Similarly, the fact that all of the appellants used Lancaster to supply some of the necessary information and to take layoffs for their individual businesses does not make them all partners in a single gambling business under § 1955. That too takes more.

The majority concedes that proof of the substantive offense under § 1955 requires the same elements as does conspiracy and then reverses the conspiracy convictions as violative of double jeopardy. While I concur in the application of the constitutional principle governing double jeopardy, I conclude that there is insufficient proof either of conspiracy or the substantive offense. In each instance, the prosecution has failed to show that com-

monality of purpose which would link the defendants into a single gambling business.[6]

In *Blumenthal v. United States*, 332 U.S. 539 (1947), the Court found one overall conspiracy and then commented on *Kotteakos*:

> The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were

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[6] The Third Circuit recently reversed convictions for the related offense of conspiracy to facilitate an illegal gambling business under 18 U.S.C. § 1511 (also enacted as part of the Organized Crime Control Act of 1970) for lack of evidence that five or more persons were involved. *United States v. Riehl*, 460 F.2d 454 (3d Cir. 1972). The court found that while one defendant was indeed selling "punchboards" for gambling purposes in violation of state law, and two others were arguably engaged in helping him do that, nevertheless there was no showing that *five* persons were involved. The defendant's employees did not handle the punchboards. The others were found to be merely customers, who bought the punchboards and used them for gambling purposes. Their independent character was not lost merely because they purchased the essential supplies for their type of gambling business from a common supplier. Since they did not kick back any of the profits to the punchboard supplier, the court found that they were not involved in his business for purposes of the statute, but rather "operated for their own account." *Id.* at 460. The analogy to bookmakers who cooperate only by sharing line information and exchanging layoff bets should be clear; while they do receive essential supplies from one another, that is not enough to create the danger of true large-scale organized crime the statute was intended to reach.

> distinct and disconnected, not parts of a larger general scheme both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single overall comprehensive plan.

332 U.S. at 558.

Here the government failed to prove one overall general scheme among the parties to conduct a gambling business of five or more persons. There is no proof of any agreement among the defendants generally, but rather a bare showing that several of the defendants each exchanged layoff bets with Lancaster when to do so individually benefited both parties. When it did not benefit one party, proffered layoffs were freely refused, even though in at least one instance that meant that Lancaster sustained a large loss. As in *Kotteakos*, the defendants in laying off bets with Lancaster may have had similar illegal objectives, but no defendant was interested in whether the others made a profit or not. The government has failed to show that the individual defendants made Lancaster's business "their own venture."[7] *See United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (Hand, J.), *aff'd*, 311 U.S. 205 (1940).

In *United States v. Aviles*, 274 F.2d 179 (2d Cir. 1960), the court commented on the interaction necessary to fuse several independent conspiracies into a larger single combination:

> A single act may be the foundation for drawing the actor within the ambit of a conspiracy. . . . But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that

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[7] As I view the evidence, only Lancaster's "business" involved more than one person. Lonsberry and Athanas (the co-defendant who died before sentencing) sometimes relayed customer bets to Lancaster and collected losses from Lancaster's customers on his behalf. This would involve three persons in his business, but not the requisite *five* or more.

> one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multiparty conspiracy of the sort revealed in the present case, with actors performing many different tasks in many places, the inference does not necessarily follow from one contact with one member of the conspiracy.

274 F.2d at 189-90.

In commenting on *Aviles*, the Seventh Circuit stated:

> [A] single act performed with parties who are involved in more than one conspiracy may be insufficient to draw an inference of the existence of an agreement between the parties in the case of multiple conspiracies. Knowledge of the existence of the other parties to the conspiracies is insufficient. While the crime of conspiracy is completed as soon as the unlawful agreement is formed, United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), it must be shown that this agreement was made prior to or during the consummation of the single act.

United States v. Varelli, 407 F.2d 735, 743 (7th Cir. 1969).

The primary thesis of the government's case is that there exists an essential network of action between the independent conduct of the defendants with Lancaster to create a common business and thus place their conduct within the scope of § 1955. The majority observes that "layoff betting is the major link connecting independent operations into an effective gambling organization that will work profitably and well for all concerned." As earlier discussed this reasoning places every local bookmaker within a federal conspiracy whether he knows it or not. This clearly was not the intent of Congress. In commercial enterprises, wholesale businesses depend on retail es-

tablishments to purchase and distribute the goods sold to them by the manufacturers who have made them each financially dependent on the other—yet, no law suggests that this interrelationship establishes a commonality of a single business. *Cf. United States v. Falcone*, 311 U.S. 205 (1940).

Simply because we deal with criminal legislation we should not twist common terminology from accepted understanding to accommodate the jurisdictional limits of federal prosecution.

A true copy.

Attest

Robert C. Tucker
Clerk
U.S. Court of Appeals
Eighth Circuit